TEE AH CHAI

v.

WONG CHEE CHOON

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[SUIT NO. P 25-303/36]
24 MAY 1989

TORT: *Damages - Loss of future earnings - Plaintiff found employment at same salary as at time of injury RM500 - Earning Capacity - Plaintiff was van driver prior to accident and earning RM500 per month - At time of trial working as an odd job labourer earning RM500 - Plaintiff passed Form Five examination - Criterion for determination of an award under head of loss of earning capacity - Whether any evidence that there is a substantial or real risk plaintiff would lose his job as an odd-job labourer before estimated end of working life.*

The plaintiff claimed for damages in respect of personal injuries sustained by him in a motor vehicle accident which occurred on 19 September 1983 at about 8.00 am. Prior to the date of the accident on 19 September 1988, the plaintiff was earning RM500 per month as a van driver. In 1987, the plaintiff was forced to work as an odd-job labourer and was earning RM500 per month.

The issue was whether the plaintiff was entitled to loss of earning capacity.

Held:

[1] There is absolutely no evidence to show that there was a substantial, let alone a real risk that the plaintiff would lose his present job at some time before the estimated end of his working life.

[2] The fact that the plaintiff who has passed his Form Five examination is reduced to doing odd-jobs for an import firm is not a good criterion for the determination of an award under the head of the loss of earning capacity. Indeed the plaintiff is better situated than some Form Five graduates who are unable to find any employment or who are earning less than he does.

[3] For the aforesaid reasons no award can be made under the head of the loss of earning capacity.

[No award for loss of future earnings/earning capacity.]

Cases referred to:

Ratnasingam v. Kow Ah Dek [1983] 2 MLJ 297
Kow Ah Dek v. K. Ratnasingam [1981] 2 MLJ 24
Chong Ying Khoon v. Lee Joo Nam & Anor. [1986] 2 MLJ cciv
Murtadza bin Mohamed Hassan v. Chong Swee Pian [1980] 1 MLJ 216
Moeliker v. R. Reyrolle & Co. Ltd. [1977] 1 All ER 9
Tan Lin Siew & Anor. v. Syed Hussein bin Alwi [1987] CLJ (Rep) 362

For the plaintiff - Manjeet Singh Dhillon; M/s. Lawrence, Dhillon & Associates
For the defendant - Hamid Sultan; M/s. Jagjit Singh & Co.

JUDGMENT

Lim Beng Choon J:

The plaintiff in the present case is claiming for damages in respect of the personal injuries sustained by him in a motor vehicle accident which took place at about 8.00 a.m. on 19 September 1983.

The plaintiff was riding his motorcycle bearing Registration No. BAL 2607 along Jalan Ipoh on the morning of the day in question to go to his place of work at Selayang Bahru. He had a pillion rider with him on his motorcycle whose name is Khoo Ah Lek, PW3.

At the material time, the width of Jalan Ipoh was about 50 feet and it was separated by a concrete road divider into two halves. Viewing from the direction of Kuala Lumpur, the left half was meant for the use of north bound traffic while the right half was for south bound traffic. Each half of Jalan Ipoh was served by a dual carriageway with a central white broken line dividing the two lanes of the carriageway.

While the plaintiff was approaching the junction along Jalan Ipoh leading to Selayang Bahru, he saw a motor cycle bearing Registration No. BBK 780 approaching from Rawang along the right half of the road. The rider of this motorcycle suddenly mounted the concrete road divider, crossed over it and made a 'U' turn along the left half of Jalan Ipoh. In so doing the motorcycle, BBK 780, encroached on to the path of the plaintiff who thereupon applied his brakes. Apparently it was too late. In the result the front wheel of the plaintiff's motorcycle went on to hit the motorcycle BBK 780 and the plaintiff fell on the road and lost consciousness. He was taken to the Hospital Besar Kuala Lumpur.

Under cross examination, the plaintiff asserted that he was at the material time, travelling between 35-45 kmph and that prior to the collision he was travelling close to the central white broken line along the right lane of his half of Jalan Ipoh. In answer to the question as to why he did not move along the left lane considering that he was only doing between 35-45 kmph, he said that there were many vehicles on his left. To another question posed to him by the learned defence Counsel, the plaintiff said that he could not avoid the collision as he had no reason to expect that the rider of the motorcycle BBK 780 would suddenly encroach on to his path to make a 'U' turn.

Now, the plaintiff's version of what took place at the scene of the accident was supported by the statements he made to the police when he lodged a police report on 14 November 1983. In the course of his giving evidence he had identified and acknowledged that the police report appearing at p. 5 of the Exhibit 'AB1' was made by him.

The plaintiff also called Khoo Ah Lek, who was riding on the pillion of his motorcycle at the material time, to testify. This witness, PW3, was not asked as to how the accident occured. He was however, offered by the Counsel for the plaintiff to the defence for cross-examination. I cannot say that I would approve such a tactical move by the plaintiff's Counsel; nevertheless as the defence Counsel had not thought it fit to make an issue of this matter - he had merely declined to cross-examine this witness - I do not think that this Court should do so particularly when it has no reason to question the credibility of the plaintiff himself. The evidence of the plaintiff has not been challenged and neither has it been shaken.

More important, however, is that the defence had elected not to adduce any evidence - the defendant had even failed to appear at the trial of this case. In the result, the learned defence Counsel had no choice but to proceed with the making his submission on the evidence adduced by the plaintiff. He contended that since the plaintiff was travelling at 35-45 kmph at the material time and he did see the rider of the motorcycle BBK 870 mounting the concrete road divider, he could very well have avoided the collision had he only taken proper evasive action by swerving to the left lane of his half of the road. The answer to this contention can be found in the evidence given by the plaintiff where he said that he was not able to move over to the left lane because "there were many vehicles on my left" and that he had no reason to expect the rider of the motorcycle No. BBK 780 to cross over the concrete road divider and encroached on his path in order to make a 'U' turn. At any rate I have scrutinised the evidence with care and I am satisfied that the plaintiff has, on the balance of probabilities, proved that the defendant is 100% liable for the collision and I do so hold.

The next matter that I must consider is of course the quantum of damages.

I shall deal first with special damages. Adverting to the pleadings, the Counsel for the plaintiff indicated to me that he had abandoned the claims made under items (a), (c) and (f) (there is no item (d)) and that the claim made under item (e) for purchase of medical, RIMV and police reports, had been agreed by the parties in the sum of RM120. As to item (b) relating to loss of earnings I do not think that there can be any serious dispute over the monthly income of the plaintiff prior to the accident. His employer had given the plaintiff a letter dated 1 November 1985 stating that the plaintiff was employed by Kee Tat Trading Co. from 1 March 1983 to 30 September 1983 as a lorry driver earning a salary of RM500 per month. This employer had also appeared at the trial of this case as PW1 to testify for the plaintiff. In his evidence, he confirmed that the plaintiff was employed by the said company and that he was paid a monthly salary of RM500 as a van driver. He had also identified the letter of 1 November 1985, which was included in Exhibit 'AB1' at p. 10, as the one written by him. In cross-examination, PW1 was asked about EPF contributions. He asserted that he did subscribe to EPF contributions for all his 10 employees, but the EPF documents were apparently lost when his company shifted to new premises. At any rate he said that the company had ceased doing business some time ago. From the evidence set out above, I hold that the plaintiff was earning an income of RM500 per month immediately prior to the accident of 19 September 1983.

There still remains the vexing issue of the period within which the plaintiff was kept out of work because of the injuries sustained by him. On this point the learned defence Counsel suggested a period of three months. Reverting to the evidence on this point, it is to be noted that the plaintiff had said in his evidence that he was unable to work for about two years as he 'often felt giddy'. His sister, PW4, had also said in her evidence that the plaintiff "was not working for more than one year after the accident" as he was "always complaining of giddiness." However that may be I am not prepared to accept these assertions *per se* considering that both of these witnesses have some interest in the outcome of this case particularly when their evidence appeared to me to be quite incredible in that if the giddiness was so severe and so frequent as to disable the plaintiff from working, one would have expected him at least to complain to the doctor who was treating him at the outpatient department of the Hospital Besar for some three weeks after his discharge from the same hospital on 8 October 1983. Yet he did nothing of that sort - see the hospital report enclosed at p. 3 of Exhibit 'AB1'. Be that as it may, I think

it is fair to say that the plaintiff would be disabled from working for some time since he was still undergoing anticonvulsion therapy some 40 days after the accident. I therefore hold that the plaintiff was kept out of work for a period of 6 months. The award for the loss of pre-trial earnings is therefore 500 x 6 = 3000.

I shall now turn to consider the general damages. I shall first deal with the award under the head of pain and suffering and loss of amenities. The learned Counsel for the plaintiff suggested a sum of RM70,000 and he relied on two authorities to support his argument. The first case is *Ratnasingam v. Kow Ah Dek* [1983] 2 MLJ 297. It is to be noted that in this case the only question before the Privy Council was whether the award in respect of the loss of future earnings was a fair and reasonable one. That being the case, the judgment of the Privy Council does not show the extent of the injuries sustained by the plaintiff in this case. However, I have taken upon myself to scrutinise the judgment of our Federal Court when the same case was brought on appeal to it see *Kow Ah Dek v. K. Ratnasingam* [1981] 2 MLJ 24. A detailed account of the injuries suffered by the plaintiff in this case, as well as the period of his stay in the hospital and the duration of his inability to resume work was set out in the judgment of the Federal Court. To my mind it is clear that the *Ratnasingam's* case is distinguishable because firstly the plaintiff there was hospitalised for 1½ months while the plaintiff in the present case was kept in the Hospital Besar for only 19 days. Secondly there is no doubt that the injuries sustained by the plaintiff there were (*sic*) more severe.

As to the second case of *Chong Ying Khoon v. Lee Joo Nam & Anor.* [1986] 2 MLJ CCIV, there too the injuries suffered by the plaintiff were (*sic*) more severe. Furthermore although the brief report of that case does not show how long the plaintiff was hospitalised, nevertheless it is stated that he "was gravely ill and was comatose for more than one month" thereby suggesting that the period during which he was kept in the hospital could not be less than a couple of months. The facts in this case again are clearly distinguishable.

On the other hand, the defence Counsel drew my attention to the case of *Murtadza bin Mohamed Hassan v. Chong Swee Pian* [1980] 1 MLJ 216. There the Federal Court allowed a sum of RM20,000 as general damages for pain and suffering and loss of amenities. The injuries suffered by the plaintiff in this case are generally comparable with those sustained by the plaintiff in the present case. Considering that the case was decided almost 9 years ago and that the value of the ringgit has decreased since then I think an amount of RM25,000 for pain and suffering and 'loss of amenities is a fair and reasonable one.

I shall now turn to the claim for loss of future earnings. The learned Counsel for the plaintiff did not pursue this claim and chose to contend that an award should be made under the head of loss of earning capacity. At any rate even had Counsel elected to argue that an award should be made under the head of loss of future earnings I would not have made any award under this head considering that the plaintiff was able to find employment in 1987 which paid him a starting salary of RM500 p.m. which is exactly the same as the starting salary which he was earning prior to the accident.

Finally in contending that an award of RM25,000 should be made under the head of loss of earning capacity, the learned Counsel for the plaintiff argued that as the plaintiff was forced to work as an odd-job labourer notwithstanding that he had passed his Form Five

Examination, he was therefore entitled to this award. I cannot agree with such a proposition. The legal principle applicable to the making of such award is well spelt out in *Moeliker v R. Reyrolle & Co. Ltd.* [1977] 1 All ER 9:

> In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the Court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the Court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which, in a particular case, will or may effect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialise. No mathematical calculation is possible in assessing and quantifying the risk in damages. If however, the risk of the plaintiff losing his existing job, or of his being unable to obtain another job or an equally good job, or both, are only slight, a low award, measured in hundreds of pounds, will be appropriate.

This principle was cited with approval by our Supreme Court in *Tan Lin Siew & Anor. v. Syed Hussein bin Alwi* [1987] CLJ (Rep) 362. Transposing the principle to the present case, it is to be noted that there is absolutely no evidence to show that there is a substantial, let alone a real risk, that the plaintiff would lose his present job at some time before the estimated end of his working life. That being the case how can this Court assess the plaintiffs loss of earning capacity? The fact that the plaintiff who had passed his Form V Examination is reduced to doing odd jobs for an import firm is not a good criterion for the determination of an award under the head of the loss of earning capacity. Indeed the plaintiff is better situated than some Form V graduates who are unable to find any employment or who are earning less than he does. For the aforesaid reasons no award can be made under the head.

Now to summarize the awards given under the various heads:

1) Special damages as agreed	-	RM 120
2) Loss of pre-trial earnings	-	RM3,000
3) Loss of future earnings	-	Nil
4) Loss of earning capacity	-	Nil
5) For pain and suffering and loss of amenities	-	RM25,000
Total		RM28,120
		========

The awards under items (1) and (2) shall carry interest at the rate of 3% p.a. from the date of accident to date of trial. Interest at the rate of 6% p.a. is allowed in respect of the award under item 5) from the date of the service of the writ to the date of judgment. Plaintiff shall have costs of his proceedings.

Also found at [1989] 2 CLJ 726